presumption of trafficking under s 37(da), it did not follow that the presumption of trafficking would become irrebuttable merely because the defence had failed to rebut the presumption of possession. In our opinion unless the evidence in a particular case does not obviously so warrant, it is incumbent for the court to consider whether on the balance of probabilities, the evidence of the defence has rebutted the statutory presumption of trafficking under s 37(da) as a separate exercise even though the court is satisfied on balance that the presumption of possession under s 37(d) has not been rebutted. In this case, the failure to do so was a material misdirection and was fatal to the conviction.

On the issue of trafficking, we found that the learned judge had failed to sufficiently consider the evidence of the defence witnesses, particularly that of DW9 which clearly indicated that on the night in question Hashim was in all probability the trafficker of the cannabis. In our view, the learned judge had acted on the wrong premise that once the appellant had failed to rebut the presumption under s 37(d), the presumption under s 37(da) became irrebuttable so as to relieve the court from the duty to consider separately on balance whether the presumption under s 37(da) had been rebutted. In our view, on the facts of this particular case, this error of law had occasioned a miscarriage of justice.

We, therefore, allowed this appeal by quashing the conviction and setting aside the death sentence. In the circumstances of this case, we substituted conviction under s 12(2) of the Act. Both the learned DPP and counsel for the appellant informed us that the provision for increased punishment for possession of cannabis under s 39A only came into force after the date of commission of this offence. In the circumstances, and after hearing submission in mitigation of sentence, we imposed a prison term of five years from today (21 May 1991), which was then the maximum term under the section before amendment.

Appeal allowed.

Solicitors: *Karpal Singh & Co.*

Reported by *Prof Ahmad Ibrahim*

Hongkong & Shanghai Banking Corp v Yip Kim Khoon

HIGH COURT (KUALA LUMPUR) — BANKRUPTCY NO D1-29-13725-89
SHAIK DAUD J
3 JUNE 1991

Bankruptcy — Bankruptcy petition — Petition filed in wrong court — Petition ought to be filed in court of the State in which judgment debtor carried on business for greater part of year preceding petition — Whether petition bad in law — Failure to disclose security in petition — Security given by third party — Whether entitled to benefit of security — Bankruptcy Act 1967, ss 2 & 5 — Bankruptcy Rules 1969, r 101(1) & (2)

Civil Procedure — Filing of petition — Petition not filed in court of State where judgment debtor carried on business — Whether petition bad in law

The petitioner had filed a bankruptcy notice based on a judgment obtained on 19 August 1987. Following this, a creditor's petition was taken out. The judgment debtor opposed the petition on two grounds: (1) that the petition was filed in the wrong court contrary to r 101(1) and (2) of the Bankruptcy Rules 1969, and (2) that the creditor was a secured creditor, and contrary to s 5(2) of the Bankruptcy Act 1967, the creditor failed to state in its petition whether it was willing to give up its security for the benefit of the creditors or give an estimate of the value of the security.

Held, dismissing the petition :

(1) The provisions of r 101(1) and (2) are very clear and unambiguous. It is mandatory and the petition must be filed in the particular State in which the debtor does his business for a greater part of one year preceding the petition. The creditor cannot choose or elect to file in the State more convenient to him. In this case, there is clear evidence which had not been rebutted, that although the debtor normally resides in Selangor, he had carried on his business in Johor Bahru since November 88, well over a year immediately preceding the date of the petition. The petition is bad in law and ought to be set aside.

(2) The creditor failed to disclose in the petition that by a deed of assignment, the entire rights and interests in the property identified as Lots 42-IJ and 42-IK 1st Floor City Towers Kuala Lumpur had been assigned as security. The fact that the property belonged to a third party does not deprive the judgment debtor of the benefit of the security which the creditor may have against the principal debtor. A surety, which the judgment debtor was, is for all intents and purposes a debtor to the judgment creditor.

[Bahasa Malaysia summary

Pempetisyen telah memfailkan satu notis kebankrapan berdasarkan satu penghakiman yang diperolehi pada 19 Ogos 1987. Berikutan dengan ini, satu petisyen pemiutang telah dikeluarkan. Penghutang penghakiman mencabar petisyen itu atas dua alasan: (1) bahawa petisyen itu difailkan di dalam mahkamah yang salah berlawanan dengan k 101(1) dan (2) Kaedah-Kaedah Kebankrapan 1969, dan (2) bahawa pemiutang adalah pemiutang bercagar, dan berlawanan dengan s 5(2) Akta Kebankrapan 1967, pemiutang gagal menyatakan di dalam petisyennya sama ada ia rela melepaskan cagarannya

bagi faedah pemiutang-pemiutang atau memberikan satu anggaran nilai cagaran itu.

Diputuskan, menolak petisyen itu:

(1) Peruntukan k 101(1) dan (2) adalah sangat jelas dan tidak kabur. Ia adalah mandatori dan petisyen mesti difailkan dalam negeri di mana penghutang menjalankan perniagaannya untuk sebahagian besar satu tahun sebelum petisyen itu. Pemiutang tidak boleh memilih atau melantik untuk memfail dalam negeri yang lebih mudah baginya. Di dalam kes ini, terdapat keterangan yang jelas yang tidak disangkal, bahawa walaupun penghutang biasanya tinggal di Selangor, beliau telah menjalankan perniagaannya di Johor Bahru sejak November 1988, lebih daripada setahun sebelum tarikh petisyen itu. Petisyen itu tidak sah di sisi undang-undang dan harus diketepikan.

(2) Pemiutang gagal menzahirkan di dalam petisyen itu bahawa melalui satu suratikatan penyerahhakan, segala hak dan kepentingan di dalam harta yang dikenali sebagai Lot 42-IJ dan 42-IK Tingkat Satu City towers Kuala Lumpur telah diserahhak sebagai cagaran. Hakikat bahawa harta itu adalah kepunyaan satu pihak ketiga tidak menafikan penghutang penghakiman faedah daripada cagaran itu yang pemiutang mungkin ada terhadap penghutang utama. Seorang penjamin, dan penghutang penghakiman di sini adalah seorang sedemikian, adalah untuk semua tujuan seorang penghutang kepada pemiutang penghakiman.]

[*Editorial Note*: The petitioner has appealed to the Supreme Court vide Civil Appeal No 02-170-91.]

Legislation referred to
Bankruptcy Act 1967 ss 2, 5
Bankruptcy Rules 1969 r 101(1), (2)

Lee Chan Tong for the petitioner.
V Kanalingam for the judgment debtor.

Cur Adv Vult

Shaik Daud J: This is an application to set aside a notice of bankruptcy and a creditor's petition by the judgment debtor. The bankruptcy emanated from a judgment obtained by the judgment creditor on 19 August 1987 whereby the judgment debtor was ordered to pay a sum of $250,000 together with interest at the rate of 11.25% per annum from 22 April 1987 to the date of full payment and costs. The judgment creditor issued a bankruptcy notice dated 6 December 1989 for a total sum of $324,212.60. Following this, a creditor's petition dated 17 April 1990 was taken out.

In the notice of intention to oppose the petition, the judgment debtor sets out two grounds. The first bone of contention by the judgment debtor is that the petition was filed at the wrong court, contrary to r 101(1) and (2) of the Bankruptcy Rules 1969 ('the Rules') which reads as follows:

> (1) The petition shall be filed in the Court in which it is to be presented;
> (2) Where the debtor has for the greater part of one year immediately preceding the presentation of the petition carried on business in one State and resided in another State the petition shall be filed in the Court of the State in which he has carried on business.

In his notice to oppose the petition, the debtor averred in para 2 that for the greater part of one year immediately preceding the presentation of the petition he had carried on business in the State of Johore and had also resided for the greater part of the said year at Ampang in the State of Selangor. He further averred that he had carried on business at Suite 1007, 10th Floor, Merlin Tower, Jalan Meldrum, Johore Bahru.

In answer to these the creditor in his affidavit in reply (encl 14) averred that the debtor had carried on business in Kuala Lumpur through his company, of which he was a director, called Bornion Company (KL) Sdn Bhd, having its offices at No 42-IJ, 1st Floor, City Towers, Jalan Alor, Kuala Lumpur and as such the petition was correctly and lawfully filed in Kuala Lumpur. In answer to this the debtor in his affidavit in reply (encl 15) averred that he was a director of the said Bornion Company (KL) Sdn Bhd but in July 1987, the company had become defunct and ceased to carry on or conduct any business.

Learned counsel for the debtor argued that since the petition was dated 17 April 1990 and as the debtor had been carrying on business in Johor Bahru since November 1988, r 101(2) clearly applies.

The provisions of r 101(1) and (2) are very clear and unambiguous. The words 'shall be filed' means what it says, that is, it is mandatory and must be filed in the particular State in which the debtor does his business for the greater part of one year preceding the petition. The creditor cannot, to my mind choose or elect to file in the State more convenient to him. In this case there is clear evidence, which had not been rebutted by the creditor in his affidavit in reply, that although the debtor normally resides in Selangor he had carried on his business in Johore Bahru since November 1988, well over one year immediately preceding the date of the petition. It is my finding that the proper place for the petition to be filed is the High Court in Johore Bahru. The creditor has wrongly filed this petition in Kuala Lumpur and as such, on this point alone, I hold that the petition is bad in law and ought to be set aside.

The second ground put forth by the debtor is that as the creditor is a secured creditor, s 5(2) of the Bankruptcy Act 1967 ('the Act') applies. Now s 5(2) states:

> If the petitioning creditor is a secured creditor he must in his petition either state that he is willing to give up his security for the benefit of the creditors in the event of the debtor being adjudged bankrupt or give an estimate of the value of his security. In the latter case he may to the extent of the balance of the debt due to him, after deducting the value so estimated, be admitted as a petitioning creditor in the same manner as if he were an unsecured creditor.

By the definition in s 2 of the Act, a secured creditor means:

> a person holding a mortgage, charge or lien on the property of the debtor or any part thereof as a security for a debt due to him from the debtor but shall not include a plaintiff in any action who has attached the property of the debtor before judgment.

By a deed of assignment dated 14 April 1986, the entire rights and interests in and to the property identified as Lots 42-IJ and 42-IK 1st Floor, City Towers, Jalan Alor, Kuala Lumpur had been assigned to the creditor as security. This, contends the debtor, had not been disclosed and as such para 3 of the petition is misleading. The security was assigned absolutely to the creditor in consideration of the creditor extending an overdraft facility of $250,000 to the principal debtor, ie Bornion Co Sdn Bhd and it was in consideration of that facility that the debtor agreed to be a guarantor. This averment by the debtor (in encl 13) was never denied by the creditor. Since no mention of this security was made in the petition, the creditor has therefore violated s 5(2) of the Act.

Counsel for the creditor contends that since the property did not belong to the debtor in this petition but to a third party, there is no need to mention this in the petition. He contends that s 5(2) of the Act talks of the property of the debtor and this means the principal debtor. He cited s 94 of the Contracts Act 1950. With respect, this section does not help the creditor because it gives the surety (as the judgment debtor in this petition is) entitlement to the benefit of every security which the creditor has against the principal debtor. Thus in this petition the judgment debtor (Yip Kim Khoon) is entitled to the benefit of the security (the assigned property) which the creditor has against the principal debtor (Bornion Company (KL) Sdn Bhd). In any case I feel that the word 'debtor' in s 5(2) of the Act must be given a wider meaning than just the principal debtor. A surety against whom a judgment had been entered is for all intents and purposes a debtor to the judgment creditor.

Since the judgment creditor had violated s 5(2) of the Act and r 101(2) of the Rules, I dismissed the petition.

Petition dismissed.

Solicitors: *Lek Yan & Co; VK Lingam & Co.*

Reported by *Yap Shao Sin*

Ng Wan Chan v Majlis Ugama Islam Wilayah Persekutuan & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO R1-22-4-91
EUSOFF CHIN J
26 JUNE 1991

Islamic Law — Conversion to Islam — Requirements and evidence of — Whether deceased properly converted to Islam — Whether if properly converted he had renounced the religion of Islam before he died — Administration of Muslim Law Rules 1953, r 10 — Administration of Muslim Law Enactment 1952, ss 2, 4, 11, 146 & 148

Words and Phrases — 'Forthwith' — Administration of Muslim Law Enactment 1952 (Selangor), s 148

Words and Phrases — 'Murtad'

In this case, the plaintiff applied for a declaration that her husband, the deceased, was a Buddhist during his lifetime and at the time of his death on 2 May 1991. The Majlis Ugama Islam Wilayah Persekutuan ('the MUI') alleged that the deceased was a Muslim at the time of his death. A certified copy of an application form for conversion to Islam submitted by the deceased dated 24 December 1973 was produced. It appeared that the conversion ceremony was done by one Haji Adam KC Chao but there was no evidence as to the date of the ceremony or where it was performed, nor was there evidence that Haji Adam KC Chao was a 'pegawai' as stated in the application form. Although the conversion was alleged to have taken place on 24 December 1973, the report was only received nearly two months later by the MUI on 2 February 1974. The plaintiff gave evidence that the deceased continued to live with her until his death as a Buddhist. The main issues in the case were:

(1) whether the deceased, who was a Buddhist, was properly converted to Islam in 1973;
(2) whether the deceased, at the time of his death, was or was not professing the Muslim religion; and
(3) if he had been properly converted to Islam, whether he had renounced the religion of Islam before he died.

Held, allowing the plaintiff's application:

(1) The evidence in this case falls short of showing that the conversion was made in accordance with the provisions of the Administration of Muslim Law Enactment 1952 ('the Enactment') and the rules made thereunder. The conversion was not reported forthwith to the MUI and there was no evidence that the person who did the conversion was a 'pegawai masjid'. There was a failure to comply with the provisions of s 148 of the Enactment and r 10 of the Administration of Muslim Law Rules 1953.

(2) There was no evidence to show that the conversion of the deceased to Islam had been done in accordance with the requirements of Islamic law. The production of the register of converts or the Mufti's certificate by the MUI is not sufficient proof of any conversion having occurred, as there is no provision in any written law to enable the register to be accepted as conclusive proof of the facts stated therein.

(3) The activities of the deceased during his lifetime clearly showed that they did not conform to the conduct that may reasonably be expected of a person who professes and practises the Muslim religion. In the circumstances, even assuming that the deceased had been properly converted to Islam, it was necessary for the MUI to adduce evidence to the effect